ESA | EFTA Surveillance Authority

Case No: 80996
Document No: 1092776
Decision No: 010/20/COL

REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Norway's breach of Articles 31 and 40 of the EEA Agreement by maintaining in force administrative practices and rules, which limit investors from owning more than 20-25 percent of the total shares in a financial undertaking and according to which the ownership of banks and insurance companies has to be dispersed by offering shares on the market

1 Introduction

1. By a letter dated 28 August 2017 (Doc No 867116), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that, following the judgment of the EFTA Court in Case E-08/16 *Netfonds Holdings* [1], the Authority had opened an own initiative case to examine whether Norwegian rules and administrative practices concerning the authorisation of banks and insurance companies complied with Articles 31, 36 and 40 of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement").
2. In the judgment in *Netfonds Holdings*, the EFTA Court interpreted Articles 31, 36 and 40 EEA in the context of the Norwegian rules and administrative practices applicable to the ownership of Norwegian companies at the time of their application for authorisation as banks and insurance companies, as described by the referring court. It concluded that those rules and practices constituted restrictions falling predominantly within the scope of Article 31 EEA, which either did not seem to be suitable to achieve the identified legitimate objective or, if suitable, seemed to go beyond what was necessary in order to attain that objective.
3. Moreover, on 12 July 2018, the Authority received a complaint (Doc No 923939-923947) concerning a rejection by the Norwegian Ministry of Finance of an application to establish a bank, based on a general evaluation of the planned ownership structure of the prospective bank, in which the complainants, two independent cooperative building associations, intended to establish an ownership percentage of 25 percent each, representing a qualifying holding of the bank. According to the complainants, Norwegian rules and administrative practices concerning the authorisation of financial undertakings are in breach of the EEA Agreement.
4. In this reasoned opinion, the Authority maintains its conclusions presented in the letter of formal notice of 10 April 2019 (Doc No 924240), that Norway has infringed Articles 31 and 40 of the EEA Agreement by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act [2].

2 Correspondence

5. In the abovementioned letter of 28 August 2017, the Norwegian Government was invited to inform the Authority of how it intended to comply with the EFTA Court's judgment in *Netfonds Holdings*.
6. The Norwegian Government replied by letter dated 28 September 2017 (ref. 17/3573, Doc No 875727), where it stated that in the judgment in *Netfonds Holdings*, the EFTA Court had answered the questions referred to it by Oslo

[1] Judgment of 16 May 2017 of the EFTA Court in Case E-08/16 *Netfonds Holdings ASA, Netfonds Bank AS, and Netfonds Livsforsikring AS and the Norwegian Government* [2017] EFTA Ct. Rep. 163.
[2] *Lov om finansforetak og finanskonsern (finansforetaksloven) av 10. april 2015 No 17*.

District Court (*Oslo tingrett*). However, it had not made any decisions on whether the Norwegian legislation was in line with the EEA Agreement, and that the Norwegian Government would not be able to provide further comments on the matter before the national court's case was concluded.

7. The case was discussed at the package meeting which took place in Oslo on 26-27 October 2017 [3] where the Norwegian Government was repeatedly invited to provide a reply to the question referred to in the request for information, *i. e.* how the Government intended to comply with the EFTA Court's judgment in *Netfonds Holdings*. By letter dated 15 December 2017 (ref. 17/3573, Doc No 889073), the Norwegian Government replied to the Authority's letter following up on the meeting and put forward its view that the Norwegian legislation was compliant with EEA law and that the EFTA Court had not concluded otherwise, without further explaining the Government's line of argumentation.

8. Based on the information provided by the Norwegian Government and on the information, which could be drawn from the judgment in *Netfonds Holdings*, the Internal Market Affairs Directorate of the Authority ("the Directorate") assessed the case and preliminarily concluded that the Norwegian legislation breached Article 31 EEA. Therefore, on 20 February 2018 (Doc No 892186), it sent a Pre-Article 31 letter to the Norwegian Government.

9. Norway replied by letter of 20 March 2018 (ref. 17/3573, Doc No 903700). In that letter, it provided an explanation of the Norwegian rules and administrative practices at stake, as well as comments concerning their suitability and necessity with regard to the aims pursued.

10. The Norwegian Government was informed about the abovementioned complaint by letter of 18 July 2018 (Doc No 924555). A request for information was sent to the Norwegian Government on 1 August 2018 (Doc No 925890). On 1 October 2018 (ref. 18/2969, Doc No 932303), Norway replied to the Authority's request for information mainly referring to its reply of 20 March 2018 to the Pre-Article 31 letter.

11. The issue was discussed at the package meeting in Oslo on 25-26 October 2018 [4] where the representatives of the Norwegian Government informed the Authority that a working group was being established to assess the criteria of Section 6-3 of the Financial Undertakings Act (see Case No 77973). It was proposed that this working group would also look into the financial undertakings' ownership regime. The report of the working group was expected in spring 2019.

12. After having assessed the Norwegian provisions and practices at issue, on 10 April 2019, the Authority issued a letter of formal notice to Norway. In this letter, it held the view that by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act, Norway has failed to fulfil its obligations arising from Articles 31 and 40 of the EEA Agreement.

[3] See the follow-up letter to the package meeting, Doc No 878916.
[4] See the follow-up letter to the package meeting, Doc No 1039214.

13. Norway replied to the letter of formal notice on 11 June 2019 (ref. 17/3573, Doc No 1074428). In its reply, the Norwegian Government, among other things, informed the Authority that on 26 April 2019, an expert working group delivered a report on the suitability assessment of large owners in financial undertakings [5]. The report discussed *inter alia* the ownership control regime and suggested amendments to the Norwegian legislation. According to the Norwegian Government, the issues raised in the letter of formal notice are closely connected with the national proceedings where the Government is a party and with the rules assessed in the experts' report, which was being considered by the Ministry of Finance. In light of this situation, the Government considered that it was not in a position to elaborate in detail on the issues raised in the letter of formal notice and only commented on certain aspects of the letter.
14. The case was discussed at the package meeting in Oslo on 24 and 25 October 2019 [6], where the representatives of the Norwegian Government informed the Authority that the national proceedings pending at the Court of Appeal had been postponed until June 2020. The Government was also still looking into how to follow up the experts' report of 26 April 2019.

3 Relevant national and EEA law

15. For the account of the relevant national and EEA law the Authority refers to, correspondingly, **Part 3** and **Part 4** of the letter of formal notice.

4 The Authority's assessment

4.1 The Authority's conclusions made in the letter of formal notice

16. As explained in **Part 5.1** of the letter of formal notice, the subject matter of the current infringement proceedings against Norway is the administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, unless the shareholder is a financial undertaking or small niche undertakings are established in the field of banking and insurance ("the administrative practice restricting ownership in financial undertakings"). This administrative practice was acknowledged by the Norwegian Government, as well as recognised by *Oslo tingrett*.
17. In addition, the subject matter of the infringement proceedings is the issue rule, *i. e.* a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act.
18. Both in the letter of formal notice and in this reasoned opinion the administrative practice restricting ownership in financial undertakings and the

[5] Accessible at: https://www.regjeringen.no/no/aktuelt/utredning-om-utforming-av-eierkontrollreglene/id2643416/.
[6] See the follow-up letter to the package meeting, Doc No 1096584.

issue rule are assessed as a whole. Both the practice and the rule are herein referred to as “the Norwegian rules”.

19. The Authority refers to its assessment in **Part 5.2** and **Part 5.3** of the letter of formal notice to conclude that the Norwegian rules constitute a restriction on the freedom of establishment under Article 31 EEA or, as the case may be, on the free movement of capital under Article 40 EEA. For the reasons explained in the above-mentioned parts of the letter of formal notice, this restriction cannot be considered suitable nor, in any event, necessary with regard to the aims indicated by the Norwegian Government.

4.2 The position of the Norwegian Government in the reply to the letter of formal notice

20. In the reply to the letter of formal notice, the Norwegian Government has neither disputed the Norwegian rules, as described by the Authority, nor disputed that the rules at issue constitute a restriction on the freedom of establishment or, as the case may be, on the free movement of capital.

21. It reiterated, however, that the rules could be justified by overriding reasons of general public interest, are suitable and do not go beyond what is necessary with regard to those reasons. In that respect, the Government mainly referred to its arguments made in the letter of 20 March 2018 and stated that, in the view of the national proceedings pending at the Court of Appeals and the experts’ report, which was being considered by the Ministry of Finance, the Government was not in a position to elaborate in detail on the issues raised in the letter of formal notice and only commented on certain aspects of the letter.

22. In addition to its arguments in the letter of 20 March 2018, the Government, first, questioned whether the Authority had assessed the suitability of the Norwegian rules with a correct starting point. In that respect it referred to, for example, paragraph 66 of the letter of formal notice, where the Authority found that the evidence could not be considered “*conclusive*”, as well as to paragraphs 71 and 72 of the letter. In the view of the Government, the relevant test when considering the suitability of a measure is whether it may be reasonable to assume that the national measure will have some effect on the attainment of the objectives pursued.

23. Second, the Norwegian Government noted that the Authority had referred to the judgment and analyses from *Oslo tingrett*. However, the Government has appealed the judgment.

24. Third, Norway contended that even though it is for the national authorities to demonstrate that the national rules are necessary, the burden of proof and the intensity of the judicial review could differ depending on the characteristics of the sector and the case concerned, such as the current case, which concerns technical knowledge. According to the Government, the alternatives that the EFTA Court and *Oslo tingrett* refer to would clearly not entail an equally high level of protection as that achieved by the national measure in question.

25. Finally, in the view of the Norwegian Government, the Authority should allow the judiciary time to complete the on-going proceedings before a decision is taken on the continuation of the infringement proceedings against Norway.

This position was reiterated at the package meeting on 24 and 25 October 2019.

4.3 The Authority's reply to the additional arguments raised by Norway

26. At the outset, the Authority considers that in the letter of formal notice, it already sufficiently addressed the arguments set out by the Norwegian Government in its letter of 20 March 2018.

27. Further, as regards the suitability of the Norwegian rules, the Authority's assessment in the letter of formal notice is supported essentially by three arguments: first, the doubts concerning the premise on which the Norwegian rules are based (paragraphs 63-72 of the letter of formal notice); second, the inconsistency of the Norwegian rules, as they cannot apply to subsequent acquisitions (paragraphs 73-80 of the letter of formal notice); and third, the inconsistency of the Norwegian rules, as they do not apply in situations where a financial undertaking acquires control of another financial undertaking (paragraphs 81-86 of the letter of formal notice).

28. The criticism of the Government described in paragraph 22 above concerns the first of those arguments. Here, it must be reiterated [7] that it is for the national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that the national measure can be justified by overriding reasons in the public interest, provided that the restriction is proportionate and does not go beyond what is necessary in order to attain it. The reasons which may be invoked by an EEA State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence (for example, statistical or *ad hoc* data) substantiating its arguments [8]. It is not sufficient for an EEA State to rely on a mere assertion or conjecture.

29. In light of this, in the letter of formal notice, the Authority expressed doubts whether the evidence submitted by Norway could reasonably be considered as confirming that small shareholdings contribute to the financial stability of the market, or is it just a contention by Norway. The Authority's doubts do not concern *to what extent* small shareholdings contribute to the financial stability of the market, but *whether they have this effect whatsoever*.

30. In this respect, the Authority referred to the judgment of *Oslo tingrett*, which expressed similar doubts as regards the evidence submitted by the Government. The Authority does not see how the fact that this judgment has been appealed has any bearing on its assessment.

31. Moreover, the Authority's arguments concerning inconsistency of the Norwegian rules alone are sufficient to conclude that those rules are not suitable with regard to the aims sought. It could also be noted that although the Norwegian Government has contested the second argument referred to in

[7] See paragraph 58 of the letter of formal notice.

[8] Judgment of the Court of Justice of the European Union (CJEU) of 19 October 2016 *Deutsche Parkinson Vereinigung*, C-148/15, EU:C:2016:776, paragraphs 35 and 36 and the case law cited therein.

paragraph 27 above, it has never provided any reasoning concerning the third argument.

32. As regards the necessity test and a high level of protection chosen by the Norwegian Government in the financial sector, it has to be noted that a chosen level of protection does not release an EEA State from the burden of demonstrating that the national measures are indeed proportionate [9]. The margin of discretion of an EEA State to set a level of protection, therefore, exists within the framework of the principle of proportionality, which requires the measures adopted to be appropriate to secure the attainment of the objective that they pursue in a consistent and systematic manner and to not go beyond what is necessary in order to attain it [10].

33. Neither in the reply to the letter of formal notice nor in its previous letters, did the Norwegian Government provide any concrete arguments as to why the alternatives referred to by the Authority in paragraphs 87 and 88 of the letter of formal notice would not entail an equally high level of protection as that achieved by the Norwegian rules.

34. Therefore, as its information currently stands, the Authority must conclude that the Norwegian rules are in breach of Articles 31 and 40 EEA.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act, Norway has failed to fulfil its obligations arising from Articles 31 and 40 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

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[9] See, for example, the judgment of the CJEU of 18 October 2012, *X NV*, C-498/10, EU:C:2012:635, paragraph 37 where it is stated that "*[it] follows from well-established case-law that* ***the need for, and proportionality of, provisions*** *adopted by a Member State* ***are not excluded*** *merely because that State has chosen a system of protection different from that adopted by another Member State <…>*" (our emphasis).

[10] See also, for example, the assessment of the proportionality of the national measure in the judgment of the CJEU of 2 December 2010 *Ker-Optika*, C-108/09, EU:C:2010:725, paragraphs 57-75.

Done at Brussels, 11 March 2020

For the EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni Kristjánsson College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.